Central Law Journal.

ESTABLISHED JANUARY, 1874.

Vol. 73 ST. LOUIS, SEPTEMBER 1, 1911. No. 9

Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 1, 1911.

PROVISIONS IN EMPLOYER'S LIABILITY INSURANCE AS SUBSTITUTING INSURER AS PARTY DEFENDANT IN ACTIONS FOR DAMAGES.

It is, as we understand, the usual, if not universal, rule for the insurer in employers' liability insurance to require the insured to yield to the former all control over any claim or suit for claim for damages from injury to an employee coming within the contemplation of the policy of insurance.

This feature of such a policy has been repeatedly recognized as valid between insurer and insured and construction of its terms has been considered to fall under the familiar rule applied to insurance contracts, i. e., strictly against the insurer and *ut res magis valeat quam pereat* in favor of the insured. See 71 Cent. L. J. 39-46.

This is well illustrated by the comparatively recent case, decided by Springfield (Mo.) Court of Appeals of Rochester Min. Co. v. Maryland Casualty Co., 128 S. W. 204, and still later by the case of Humes Const. Co. v. Philadelphia Casualty. Co., 79 Atl. 1, decided by Supreme Court of Rhode Island.

In the former of these cases the insurer denied its liability, because there was no appeal taken by the employer from a judgment rendered by the trial court against it, when the policy provided that no action should lie against it until final judgment should have been rendered by a court of last resort.

The court followed a ruling by Michigan Supreme Court that the right given to the insurer to defend the action for damages gave it the right to appeal from the judgment, and it could not take advantage of its own default. See Stephens v. Casualty Co., 135 Mich. 189, 97 N. W. 686.

Specially as to the case before the Missouri Court, it was said: "Defendant having taken the defense of the case out of the hands of the plaintiff, and, after doing so, having refused to give the appeal bond, and thereby providing for a stay of execution on the judgment, and thus forcing plaintiff to pay the judgment of the circuit court, that judgment became to the plaintiff the judgment of a court of last resort, for it had no control of the appeal."

The Rhode Island case shows that the insurer denied liability after final judgment rendered upon appeal by a court of last resort, upon the ground that the plaintiff who recovered against the insured was not an employee and his injury was, therefore, not within the policy.

The insurer, however, just as in the Missouri case, had taken control of the litigation from start to finish, and for this it was held, that, notwithstanding it was found by the supreme court that the plaintiff in that suit was not an employee of the insured, yet the insurer was estopped to urge non-liability.

It was said: "The defendent without reservation, and with an apparent admission of liability in the premises, did take upon itself in behalf of this plaintiff the conduct of the defense of said suit, both in the superior court and before this court upon exceptions. When it was finally decided in this court that Driscoll was not an employee of the plaintiff, the defendant for the first time claimed that it was not liable to indemnify the plaintiff for its loss in consequence of the injuries to Driscoll."

These two cases, and we venture to say others of the same tenor may be found, hold, that when the insurer steps into the breach and sends the insured to the rear, allowing him to have no part in the fray, it will shield him to the extent it agreed, and it will not be allowed to say it is a volunteer, because it mistakenly supposed it agreed to be a substitute.

But these arrangements, so far as their validity and construction are concerned, are incidents of a contract in itself lawful, which it is said by these cases and others are for the benefit of the insurer. Furthermore, when according to the stipula-

tions of the policy the insured has surrendered, and the insurer has taken, control of a litigation brought against the former, there is an executed contract, and the court will leave the parties where they have placed themselves.

Under such a situation the court would not allow the question to be opened up of an agreement being or not illegal, as opposed to public policy, where a promisor agrees to maintain any suit that may be brought against the promisee—even to the extent of forcing him to interpose defenses and prosecute appeals.

But if, as an executory contract such a stipulation amounts to a kind of barratry and is inserted for the benefit purely of the insurer, the insured may not be deprived of the right to defend all suits brought against him, without sacrificing his insurance, as the contract would be severable. Is such a stipulation as an executory contract legal?

In the first place it is theory of the law—honored, we may admit, more in the breach than the observance—that no litigant will prosecute an action or a defense litigiously. This necessarily implies that he must be subject to no duress or coercion in the doing or not doing of either.

An action or a plea not begun or made of one's free will is not an action or plea. One must be *sui juris* to do either or be competently represented, and acting *sua sponte.*

Secondly, as it would not be lawful for any one to contract to resist by defense in court all claims, just or unjust, that may be brought against him, it follows that he cannot surrender to another his right to say what he will concede or what he will resist.

Thirdly, as creditors have the right to rely on the theory, that litigious resistance will not be opposed to rightful demands, so secret arrangements of their debtors with others, such as the stipulation contained in these policies, step outside of the contractual capacity of the debtors, when they interfere with relations between creditors and debtors.

If they do, have the creditors no means of challenging these acts of a third party interposed between them and their debtors? May one not show that his debtor is not opposing him, but the third party, for his own benefit, is opposing him by collusion between the two with the interloper to pay the expense of litigation, until he, and not the debtor, is pleased to end it or gets to the end of his row?

The cases we have cited show that, where the insured has been absolutely dominated by the insurer, the latter is held to all he agreed. But it is not said, if he had done less, the insurer would not be bound to pay the loss, and the cases at least show, that, in effect, the plaintiff and the insurer were the real parties to the litigation, while ostensibly it was conducted against the insured.

Does our jurisprudence contemplate such a status? It is certain, that there are many steps taken in law suits which purge the conscience of the parties, or their duly accredited representatives.

Sometimes pleadings are required to be sworn to. Sometimes a motion must be based upon the personal knowledge of the party in whose behalf it is made. Or resistance to the motion must be upon like knowledge. Always, when a cause is concluded in a trial court, an affidavit must be made by an appellant, that he believes himself aggrieved, before he is allowed an appeal.

Is it lawful for a litigant to agree, at the behest of another, to make all affidavits necessary for the prosecution of a case or of an appeal? Shall an ostensible party forfeit his insurance unless he swears he is aggrieved, when he is not aggrieved?

Why, then, if a defense is interposed by one who is not a party to a suit, may it not be claimed, that such defense should be stricken from the record, and a judgment for default taken against a defendant, who has not, of his own motion or through his own attorney, interposed a defense within a seasonable time?

No one may doubt for a moment whether champerty and maintenance are to

be condemned, but what we would like to learn is how a contract by an insurance company to carry on at its expense a defense of a suit instituted against another is to be distinguished from maintenance. Is it not worse than ordinary maintenance, inasmuch as it prevents a party who is sued from refusing to permit the insurance company to continue the litigation just as long as it can and will?

Courts have repeatedly condemned litigation where there is no real controversy between the parties. Is there a controversy where one of two parties has abandoned a case? And does he not abandon, if he ceases to attack or resist?

NOTES OF IMPORTANT DECISIONS

PLEADING—RULE AS TO LOSS OF FUTURE EARNINGS FROM DIMINISHED CAPACITY AFTER MAJORITY.—The St. Louis Court of Appeals, speaking through Nortoni, J., discusses very satisfactorily, we think, the question whether or not a minor, several years removed from attaining his majority, should plead loss of earnings by reason of diminished capacity from permanent injury. Ferrier v. Schoenberg Mercantile Co., 138 S. W. 893.

The plaintiff had a verdict and the trial court sustained defendant's motion for a new trial upon the ground of alleged error in instructing upon such loss as one of the elements for consideration in the measure of recovery, where the petition neither specially pleaded such loss, nor was there any evidence particularly directed thereto. This grant of a new trial was held error and the trial court was directed to reinstate the verdict and enter judgment thereon.

The learned judge cites authority as to the necessity of proving the loss of past earnings consequent upon inability to pursue one's avocation or profession, saying such a loss is "not regarded as a necesary consequence of the negligent act complained of and therefore is not embraced within a general allegation of permanent injury and damage." We might add, that even if there were the strongest presumption of loss, nevertheless it would not, in the absence of all proof, go beyond nominal damages.

Then the judge says: "There is sound reason for requiring an averment and proof of the loss of past earnings and loss of time which is said to be the same as special damages, when no such reason obtains with respect to the future earnings after maturity of a mere boy such as is involved here."

Further, he says: "The courts recognize this feature of the matter to such an extent as to affirm that in cases where the plaintiff is an infant with no fixed avocation or trade and therefore wholly unable to even conjecture what his probable future calling and loss of earnings therein may be, a recovery may be allowed on that score without any proof whatever suggesting the amount."

This is quite a clear exposition of the principle *"lex non cogit ad impossibilia,"* so far as evidence is concerned, and as so limited the defendant in the case may not have urged any objection. But the *crux* of this case was in the deduction that what is not required to be proven because in the nature of things impossible to be proven must nevertheless be claimed by the petition.

Judge Nortoni says: "In the very nature of things, a requirement to plead as special damage that which courts and juries may reckon with and mete out, though wholly unproved, suggests the veriest technicality *ad infinitum.*"

It seems to us this is not strictly accurate in expression, because the loss of future earnings is not left "wholly unproved" by evidence showing permanent injury, because there is evidence for the inference of such loss—inference as direct as that future days will bring pain and suffering, or humiliation in case of disfigurement. Therefore, like these, it falls under general damages.

In its final analysis, the principle decided would lead to a plaintiff averring what is in its nature a permanent injury and claiming a round amount without specifying a single item of what goes to make up general damages. Thus he might allege his leg was amputated to his damage in the sum of $10,000, and this pleading would be as good in the case of an adult as a minor.

Why should any pleader allege his general damages in any case? If he specifies therein something that is not of the nature of general damages, it may or not amount to pleading that specially. If not, the averment will be disregarded.

If a minor is required to aver future suffering, he should be required to aver loss of future earnings, and if an adult is not required to allege future suffering he ought not to be required to allege future loss of earnings. We doubt whether the test should be, as to necessity of specifying items in general dam-

ages, their dependency on the possibility of direct proof relating thereto.

A pleading is required not as a mere claim but as a claim to something stated with accuracy. There is no more accuracy in saying one has been permanently injured and will continue to suffer pain of body and mind to his damage $10,000, than to say he has been permanently injured to his damage $10,000.

The learned judge was right in enforcing the principle, that the law does not require a thing to be pleaded specially which demands no special proof, and what we suggest further would have been *obiter* for him to have announced, and it is getting to be a very desirable thing for judges not to indulge themselves in observations beyond the necessities of a case.

IS A "WIRELESS MESSAGE" WITHIN THE PROVISIONS OF CRIMINAL STATUTES RELATING TO TELEGRAPHS AND TELEPHONES?

1. *It is not the province of a law journal,* or of a legal editor, to take cognizance of every "point" a resourceful attorney may present, or of every question an ill-advised criminal prosecution may raise. But in those cases in which a great fundamental principal of the law is involved—especially where the exact point presented has not been passed upon or adjudicated by a court in any of the states of the Union, or any of the federal courts—a legal journal or a law editor is warranted in presenting the fundamental principles and authorities which do, or should, govern courts in arriving at a conclusion, even though they are somewhat elementary in their character.

2. *The question whether a "message" sent by electric space-telegraphy,* through the instrumentality of any of the various methods of sending what are popularly known as "wireless messages," is embraced within the provisions and prohibition of the ordinary criminal laws of a state relating to and governing telegraph and telephone lines, has been raised by an indictment recently returned by a grand jury at Los Angeles, California, "under instruction," no doubt.

3. *The occasion for this indictment,* briefly, is as follows: For a number of years there have been in Los Angles three five-cent morning papers all of the class known as of the "reactionary" type. Recently a one-cent morning paper, of the "progressive" type, was established there, resulting in a "war of types." One of the old papers published a scurrillous, not to say libellous, attack upon the owner and publisher of the new paper. The proprietor of another of the morning papers (who is said to own and control the third) telephoned to the editor of the third paper, suggesting that it reproduce the attack of paper number one. The editor of the third paper being on a vacation at Avalon, and out of the reach of telephone or messenger, the matter was communicated to him by "wireless" from the wireless station in the building of paper number one. This "message" was "taken" by a fifteen-year-old boy "operator," on a private wireless apparatus rigged up in his father's house. The new paper published the wireless message as taken by the boy operator. The genuineness of the message is not denied, and the accuracy of the "taking" is not questioned. The matter of the publication of this message in the new paper was laid before the grand jury, and an indictment returned under sec. 619 of the California Penal Code, relating to telegraph and telephone messages, and making it a felony to willfully disclose the contents of such a message without the permission of the person to whom addressed.

4. *If there is any statute in that state which will justify or support this indictment* it is found in sec. 619 or sec. 640 of the Penal Code of that state, which sections are in pari materia. Neither of these sections of the Penal Code specifically provides as to a "wireless message," and neither uses any word or words of equal import indicating any intention on the part of the legislature to include within the prohibition and punishment such a message. Such an

intention can not be incorporated into these statutes by inference and construction.[1] By express provision of the California Penal Code,[2] a criminal statute is to be "construed according to the fair import of the terms, and with a view to effect its object;" and, by the provisions of the Code of Civil Procedure of California,[3] the court is prohibited from reading into the statute language or words not incorporated therein.[4]

5. *History and import of secs.* 619 *and* 640.—These sections of the California Penal Code were both enacted on February 14, 1872, and were both amended into their present form and provisions on March 21, 1905. When these sections were originally enacted they related solely to a mode of telegraphy and to a message which depended upon "conduction;" that is, upon the conveyance of an electric current by an unbroken metallic wire suspended or laid between two stations. As a matter of fact no other method of telegraphy was at that time known, or put into practice for more than a quarter of a century thereafter.[5] These statutes having been enacted before such a thing as "wireless telegraphy," or a "wireless message," was known—or even dreamed of, unless it may have been in the privacy of the laboratory, by an eminent scientist here and there over the world—the courts, and officers of the judicial department, cannot presume that there was an intention on the part of the legislature to include within the prohibition and punishment provided in these sections a thing not known and not in existence at that time—a "wireless message." Telephones were not known at the time these sections were originally enacted; and it has always been conceded, on all hands, in California, as far as the criminal laws of the state are concerned (whatever may be the rule as to civil statutes), that telephony and telephonic messages were not embraced within the provisions of the original sections. As a matter of fact, these sections were amended on March 21, 1905, into their present form for the express purpose of making them cover telephony and telephonic messages. The amendment to sec. 619 consists simply in the insertion of the words "or telephonic" after the word "telegraphic," and before the word "message;" and the amendment to sec. 640 consists simply in the insertion of the words "or telephone" before the word "line," and also before the word "office." This shows beyond the possibility of question, or of a remote doubt, that there was no intention on the part of the legislature to so amend these sections as to make them embrace "wireless telegraphy" and "wireless messages." To bring "wireless messages" within the provisions of the criminal statutes, it is thought, it will be absolutely necessary to do so in express terms.

6. *A "wireless message" is a thing apart,* both from a telegraphic message and a telephonic message. It differs as much from each as they differ from each other; and telephonic messages had to be especially provided for by specific amendment to bring them within the operation of the statute.

7. *The word "telegraph"* is derived from a Greek word which means, literally, afar writing, or to write afar; and, as known to the law, refers to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of, first, a battery or other source of electric power; secondly, *of a line, wire, or other artificial conductor for conveying the electric current* from one station to another; thirdly, of the apparatus for transmitting, interpreting and reversing the electrical current; and, lastly, of the indicator or signalling instrument;[6] and courts take judicial notice that the "telegraph" of a railroad company consists of wires strung on

(1) See note 10, this article.

(2) Kerr's Cyc. Pen. C., sec. 4.

(3) Kerr's Cyc. C. C. P., sec. 1858.

(4) See People v. Doyle, 13 Cal. App. 611, 110 Pac. 458.

(5) See George Iles' "Flame, Electricity and the Camera," ch. XVI, New Science Library, vol. XV, p. 215.

(6) Hackett v. State, 105 Ind. 250, 261, 5 N. E. 178, 185, 55 Am. Rep. 201, 210; O'Reilly v. Morse, 56 U. S. (15 How.) 62, 134, 14 L. Ed. 601, 632. See 8 Words and Phrases, p. 6895.

poles set upright in the ground along its road.[7]

These sections of the California Penal Code, as enacted in 1872, embrace the words "telegraphic message" and "telegraph line," showing unmistakably that the only thing the legislature had in mind at the time of their message was the "conduction" method spoken of above;[8] and the amendments to the original section simply introduce the words "telephonic" and "telephone," leaving the original sections, in purpose, absolutely as they were enacted, except their extension so as to include telephone lines and telephone messages—both of which are operated through and depend upon a wire "conduction." These two sections of the California Penal Code, being in pari materia, are to be construed together, and so construed there can be no doubt or question but that "conduction" was the only method of transmission in the contemplation of the legislature.

8. *The sole object of these sections* of the California Penal Code, when enacted, and as amended, was and is to prevent the employees of telegraph and telephone lines and offices from giving out to other than the addressee, or making a private use of, messages sent and received; and also to prevent persons not employees from getting possession of the contents of messages and information not intended for and not delivered to them; that is, by the means popularly known as "wire-tapping." To accomplish or perpetrate the offense of wire-tapping there must be an overt act of invasion, a trespass, upon the rights and property—the line—of the company. No telegraph or telephone company, or other company, can have either a "right of way" or "private property" in the air. "Usque ad ocrum, et usque ad coelum," is a venerable maxim of the law. Hence, any one who goes onto a house-top and there shouts his private business into the air, which is common to and the property of all men, takes the chance of having his "shout" overheard by anyone whose premises the sound-wave passes; and if he is injured thereby, he has but himself to blame; it is damnum absque injuria. And this rule holds good, no matter in what "language" the "shout" is uttered.

9. *Elementary rules of construction.*—The conditions which justify this article make it necessary that a few of the elementary rules for the construction of criminal statutes and penal statutes shall be given. These rules are well settled; the authorities are all "one way;" and a few of the late cases, only, will be cited. One of the elementary rules for the construction of a criminal statute, is that it shall be according to the natural and obvious meaning; and where there is no ambiguity in the language used, and its meaning and purpose are clear, the courts are not authorized to either limit or extend the language of the act by construction.[9] Such a statute is open to construction in those cases, only, where there is reasonable uncertainty in the meaning.[10]

10. *Where the meaning is plain,* the statute must be carried into effect according to its language, or the court would be assuming legislative authority.[11] Where the language is clear, it is not for the court to embrace cases not described, because no reason is seen why they were not included.[12] And this rule has been widely, we might with truth say universally, followed.[13] No

(7) Youree v. Vicksburgh, S. & P. R. Co., 110 La. 791, 34 So. 779.

(8) See par. 5, ante.

(9) Cearfoss v. State, 42 Md. 403, 1 Am. Cr. R. 460; Dwr. Stats. 144; Story Conf. Laws. 10.

(10) Weirich v. State, 140 Wis. 98, 131 N. W. 662, 22 L. R. A. (N. S.) 1221.

(11) Denn v. Reid, 35 U. S. (10 Pet.) 524, p. L. Ed. 519. This doctrine has been adhered to by the Supreme Court of the United States in a long line of unbroken authorities, down to the dictum of the Chief Justice in the famous Standard Oil case, wherein the judge tried to assume legislative power and authority to add to the words of the statute the word "reasonable"—a thing Congress had specifically refused to do. Of course this dictum is not law, and it has not passed unchallenged.

(12) Denn v. Reid, supra.

(13) A few of the late cases are: Board Lake County Com'rs v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 652, 32, L. Ed. 1060, 1063; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 37, 15 Sup. Ct. 516, 39 L. Ed. 601, 611; Berlin I. B. Co. v. San Antonio, 62 Fed. 889; Grace v. Collector of Customs, 79 Fed. 318, 48 U. S. App.

case can be brought by construction within a criminal statute unless it is completely within the words.[14] Where an act is not, beyond all reasonable doubt, within the express terms of the statute, it may not be brought within the statute after the event by intendment.[15] It is not sufficient that the purpose of a criminal statute should be manifest. To be effective, that purpose must find expression in its language, as required by legal rules. Courts may be authorized, sometimes, to restrain the generality of terms used in a criminal statute so as to exclude exceptional cases, but cannot enlarge the terms of a limited law.[16]

11. *California rule*, as laid down in a recent case, is that the court, in construing a criminal statute, cannot read into it language or words not incorporated therein;[17] and that where any particular article or thing is mentioned in a criminal statute as the subject of an offense, it is such articles or things or property, only, as are popularly designated by the term used that can be regarded as embraced within the prohibition.[18] Thus, where the question involved was whether a statute making it a felony to maliciously burn a "stack" of hay included a case where the burning was the malicious burning of a "cock" or "shock" of hay, it was held that it did not. The court says: "Why the legislature did not include the act of maliciously burning 'shocks' or 'cocks' of hay within the penalty prescribed by sec. 600 of the Penal Code, is a matter which need not be inquired into here. In the determination of the question decisive of the case here, it is enough to know that the legislature did not do so, and that it is for that department of the government to say what wrongful acts shall incur the penalties."[19] Substituting the words "wireless message" for the words "shocks" or "cocks" of hay, and the sec. 600 by secs. 619 and 640 of the Penal Code, the above decision fits exactly the question of interpretation raised by the indictment returned for the publication of the wireless message "taken" by the boy "operator." Plainly, on very elementary principles of the criminal law, the act complained of is not within the prohibition and punishment of the statute relating to telegraph lines and telegraph messages.[20]

JAMES M. KERR.

Pasadena, Cal.

665; Butler v. United States, 87 Fed. 665; Hillis v. Chicago, 60 Ill. 90; Lyon v. Lyon, 88 Me. 404, 34 Atl. 182; Cearfoss v. State, 42 Md. 403, 1 Am. Cr. R. 460; Denny v. Merrifield, 128 Mass. 231; Hawkins v. Carrall Co., 50 Miss. 759; State v. Eaves, 106 N. C. 754; 11 S. E. 370, 8 L. R. A. 260; Irwin v. Irwin, 2 Okl. 219, 37 Pac. 560; Guery v. Kensler, 3 S. C. 426; Roberts v. Yarboro, 41 Tex. 451; Cline v. State, 36 Tex. Cr. 351, 36 S. W. 1108, 61 Am. St. Rep. 869; Floyd v. Harding, 28 Gratt. (Va.) 405; Com. v. Smith, 76 Va. 484; Snider v. Martin, 17 W. Va. 312, 41 Am. Rep. 681; Pack v. Hansparger, 17 W. Va. 341; Buffham v. Racine, 26 Wis. 454 (dis. op. maintaining "court cannot depart from plain meaning of statute on ground of public policy"); State v. Pullman Car Co., 64 Wis. 110, 23 N. W. 871.

(14) State v. Graham, 38 Ark. 519, 4 Am. Cr. R. 276; Gibson v. State, 38 Ga. 571; State v. Lovell, 23 Iowa, 304; State v. Chapman, 33 Kan. 134, 5 Pac. 768, 5 Am. Cr. R. 190; Remington v. State, 1, Oreg. 281. See numerous cases to this effect found in 44 Cent. Dig., col. 2894, sec. 322; 18 Dec. Dig., p. 1019, sec. 241; Am. Digs. tit. Statutes, sec. 241.

(15) Martin v. United States, 168 Fed. 198, reversing 104 S. W. 678; Erbaugh v. United States, 173 Fed. 433, 97 C. C. A. 663; McCord v. State, 2 Okl. Cr. 214, 110 Pac. 280.

(16) State v. Leo, 108 La. 496, 32 So. 447, 15 Am. Cr. R. 272.

(17) People v. Doyl, 13 Cal. App. 611, 110 Pac. 548.

(18) People v. Doyl, supra.

(19) People v. Doyle, supra.

(20) See Kerr's Biennial Suppiement, 1910-11, to Kerr's Cyc. Cal. Codes, Penal part, sec. 640.

"THE IDENTIFICATION OF A MARK."

I have read with interest an article bearing the above caption, recently published in your columns; and the conclusion therein arrived at is, as it seems to me, so much at variance with the rules and practice of experts in this department of learning that I cannot let it pass unchallenged.

A mark is defined in said article as a character (not a writing) made by an inked pen operated by a human hand and consisting of a single straight stroke or of two or more disconnected straight parallel strokes, or of two straight strokes crossing

each other. Marks for the authentication of legal documents are, of course, the marks under discussion. Such marks are usually made by illiterates, but are sometimes made by persons who can usually write, but who are so enfeebled by disease or age as to be unable to do so at the time of executing the document in question. In an experience of over forty-three years, marks made for the purpose of authenticating documents have always, so far as we have observed, been in the form of a cross, thus: × or +. We do not remember ever having seen one made otherwise. These marks are rarely made by the marksman holding and directing the pen himself, but usually by his touching the upper end of the penholder while held and directed by some other person, usually the one who draughted the instrument, who in fact makes the mark; but very rarely by the marksman holding the pen in his own hand, which, in turn, is itself held and directed in its motion by the hand of another person.

While a mark made for the purpose of authenticating a document will, if properly proved, undoubtedly be binding upon a marksman competent and able to write, yet the fact of his making a mark in such case would draw suspicion upon the document; and I have never seen one so executed except in case of illiteracy or debility as above described. Almost always the name of the party executing the instrument is written in the proper place for the signature with the mark between the Christian and sir names, though this is not absolutely necessary, if the mark can be identified and proved. Such marks may unquestionably be proved by witnesses to their execution in the same manner as ordinary signatures. Can they be proved by opinion evidence? We refer not to the question of the admissibility of such opinion evidence, but to its probative value. While cases may arise in which, under peculiar surrounding circumstances and the enfeebled condition of the marksman, it may be clear that he could not have made the particular mark in question, we contend that the ordinary mark of an illiterate or enfeebled person, unless the circumstances are very peculiar and unusual, is incapable of identification by mere opinion evidence; and such is believed to be the very general opinion of those experienced in this line of research. We have never before seen the contrary opinion advanced by any writer.

Now for the reasons for this opinion: If, as is usually the case, the mark is in fact made by the scrivener, the marksman merely touching the top of the pen-holder, the attempt to identify the marksman in such case by opinion, evidence would be flatly and absurdly impossible, for the mark takes its character, if it has any, from the one holding and directing the pen, and not from the marksman touching the top of the penholder.

The case of an illiterate actually holding and directing the pen, which rarely arises, presents a different question. The basis of the identification of any writing is the persistence of involuntary and unconscious habit carried into the written characters, which being unconscious, cannot readily be laid aside. I affirm without fear of contradiction that the illiterate marksman has no such habit and therefore no characteristics inhere in his mark. Unless it be first proved that he has practiced making his mark so as to do it automatically, as is the case with a ready writer in making letters and figures, there is no basis for an opinion, because no characteristics exist.

In the case of a person accustomed to write, but who makes his mark because of being temporarily too nervous or too feeble to write, it is clear that the making of a mark is not habitual but exceptional, and hence, as before, there is no basis for expert opinion evidence. If the real basis of expert opinion evidence above stated is kept in mind, there will be no danger of going astray in such cases. The practice of expressing an opinion upon little or no sufficient grounds, as we have attempted to show in this case, is in our opinion largely responsible for the little esteem in which expert evidence is often held, both by the

laity and the profession. A conservative course for which sufficient reason can be given is the only proper one to pursue.

DR. MARSHALL D. EWELL.

Chicago, Ill.

CONTRACTS—POLICY.

IN RE CERTAIN LANDS IN THE BLOCK BOUNDED BY AVENUE A AND FIRST AVE., FIFTY-NINTH AND SIXTIETH STREETS, AND IN THE BLOCK BOUNDED BY FIRST AND SECOND AVES., FIFTY-NINTH AND SIXTIETH STREETS, IN THE CITY OF NEW YORK.

Supreme Court, Appellate Division, First Department. April 21, 1911.

128 N. Y. Supp. 999.

A realty corporation was retained and employed by a lessee of premises to furnish "legal and other expert services" in a proceeding connected with the condemnation of the lessee's interests to a public use, under an agreement that it was to be paid 33-1/3 per cent of the award. Held, that the only "services" which could have been legitimately rendered were the services of expert witnesses, and that, as an agreement to pay the corporation for furnishing expert witnesses, it was illegal and void.

MILLER, J. The appellant, as administratrix of her husband, Max Bowsky, was awarded the sum of $3,726.50 for certain machinery and fixtures in premises occupied by him as lessee which were taken by the city in condemnation proceedings. The respondent the Realty Protective Company, filed with the comptroller a notice of claim to a portion of the award, wherefore the comptroller refused to deliver the warrant in his hands without an order of the court. This appeal is from an order denying a motion made in the condemnation proceedings to require the comptroller to deliver the warrant. The city did not oppose the motion.

Had the city objected to the summary disposition of the matter on motion, the appellant's remedy would doubtless have been limited to an action. It may be that the respondent, the Realty Protective Company, would have some standing to object to the summary disposition of the matter on motion if there was any basis to support its claim of an interest in the fund by virtue of a lien or assignment. As a mere stranger, however, it has no standing to object, and it is necessary, therefore, to determine whether there is any basis for its claim.

(1) Its claim is based upon an instrument, signed by the said Max Bowsky on the 26th of October, 1906, which provides, so far as material, as follows:

"In re Opening of Blackwell's Island Bridge.

"I do hereby retain and employ the Realty Protective Company to act for me and in my behalf in the conduct of certain proceedings affecting my property, and to furnish such legal and other expert services as it may deem necessary in connection with the taking of my property by condemnation proceedings. * * *

"And, in consideration of its services, do hereby promise, assign and agree to pay said Realty Protective Company 33 1-3 per cent of whatever sum shall be allowed or paid for or on account of such taking; said percentage to cover all expenses and disbursements of every nature whatsoever."

(2) It is settled that a corporation cannot practice law, either directly or indirectly, by employing lawyers to practice for it. Matter of Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15. The said respondent disclaims that it is practicing law, but it is impossible to construe said instrument except as a retainer to represent the said Bowsky in legal proceedings and to furnish legal services therein, in consideration of which it was to receive one-third of the recovery. It was therefore illegal upon its face.

(3) Moreover, we think it was illegal for still another reason. By it the respondent was retained to furnish legal "and other expert services." The only other expert services which could legitimately have been rendered in the proceeding were services of expert witnesses. No one would contend that an agreement to pay an expert witness one-third of the recovery was valid. An agreement to pay a corporation one-third of the recovery for furnishing expert witnesses is no less objectionable. See Lyon v. Hussey, 82 Hun, 15, 31 N. Y. Supp. 281.

(4) The said respondent filed an affidavit in which it is stated that it employed and paid an attorney to represent the interests of said Max Bowsky; that it employed and paid experts to appraise the property, several of whom testified in the proceedings as to the value of the machinery and fixtures; and that, before the appointment of commissioners, it "performed various services before city boards and officers, and conferred with the various city officers having jurisdiction over the initiatory and preliminary steps in the acquisition of the interests to be taken." It is also asserted that an owner with small interests derived an advantage from placing his matter in its hands that could not be obtained in the hands of a private attorney. It does not, however, specify the nature of the mysterious services rendered

in conferring with city officers or how any legitimate advantage is derived from employing it, instead of a reputable attorney. Certainly no legitimate services can be rendered before the city determines to acquire the property. Thereafter the question is purely one of appraisement or assessment of damages. The assertion by the respondent of some peculiar and invisible means of enhancing awards is of itself sufficient to show that such an agreement as that relied upon, by which a corporation is retained to furnish legal and other expert services in condemnation proceedings for a percentage of the award, is against the public interest. It is proper, therefore, to treat the said respondent as a mere stranger, and, the city not objecting, to direct the comptroller to deliver the warrant. Matter of Bensel, 68 Misc. Rep. 70, 124 N. Y. Supp, 726; Id. 140 App. Div. 944, 126 N. Y. Supp. 1121, 201 N. Y. 21.

The order should be reversed, with $10 costs and disbursements, and the motion granted, with $10 costs.

INGRAHAM, P. J., and McLAUGHLIN and Scott, JJ., concur. DOWLING, J., dissents.

NOTE.—*Agreements to Produce Testimony Upon Condition of Successful Event of Litigation* —The contract in the principal case is like an attorney's contingent fee. It is not one to produce evidence to prove a specific fact, but it is likened in its tendency to such a contract. It is well known that it is allowable to pay an expert to prepare himself to give testimony on a particular subject, and it has even been intimated that a contract to testify as an expert is not void on its face, as we think is shown by the following case:

Ramschasel's Estate, 24 Super. Ct. 262, was an action to recover upon a special contract a witness fee in excess of the legal rate, and the contract was attempted to be justified on the ground that the claimants were expert witnesses and that they had, therefore, the right to be paid whatever sum might be agreed upon between them and the decedent.

The court disallowed the claims solely upon the ground that there was nothing to show they were expert witnesses. It was said, however, that: "The difficulties and dangers which surround so-called expert testimony are well understood by the profession and it is the manifest duty of our courts to carefully scan all special contracts relating to the employment of experts, providing for the payment of special compensation in addition to the witness fees provided by law."

And the following case is authority for the statement that he can contract for payment for specially preparing himself to testify as an expert:

In Burnett v. Freeman, 134 Mo. App. 709, 115 S. W. 488, the facts show that a physician sued, and, while the court ruled that a physician could charge for specially preparing himself as an expert for a particular case, he neither could charge for making his compensation dependent on his being required to testify in a case or be paid other than statutory fees for testifying.

In the next following case, evidence as to a specific thing for a specific sum was to be produced for use in a case, but a specific result was not conditioned, though it was conditioned that the evidence should be to establish a particular thing. It was held not inhibited as against public policy.

In J. I. Case Threshing Mach. Co. v. Fisher & Auey (Iowa), 122 N. W. 575, there was a contract for a manufacturing company to pay to others a certain sum if they could procure evidence as to a specific fact, which evidence was to be used in litigation then pending between this company and another company. The court said: "The claim that defendants committed a legal wrong in furnishing evidence for use in its suit against the Indiana company is without foundation. Cases are cited to the effect that it is illegal to agree to furnish evidence for a consideration to be paid only in the event that the party procuring the evidence is successful in his suit. * * * But here there was no inducement held out to defendants to procure evidence that should accomplish a specific result. * * * There was nothing in these transactions tending in the remotest way to the corruption of justice."

In a former New York Court of Appeals case the compensation was contingent upon success, but the court adjudged its validity upon the ground that the promisee was not an entire stranger to the mortgage involved. The tendency, however, seems to have been just as apparent on the face of the contract, as if the promisee had been a stranger.

Thus in Wellington v. Kelley, 84 N. Y. 543, there was a contract to furnish to a mortgagor the papers and evidence necessary to defeat a foreclosure action, and if thereby the action was defeated, the mortgagor was to pay one-half the amount of the mortgage. The evidence was furnished and the action was defeated. It was claimed the contract tended to pervert justice.

Andrews, J., speaking for the court, said: "It is to be observed that no corrupt intention appears upon the face of the contract, and, construing it in view of the situation of the parties and what was done under it, there is no ground for supposing that it was entered into for the purpose of perverting justice by the production of false testimony in support of the defense in the foreclosure action."

The court further said: "An agreement by a stranger to furnish evidence to substantiate a claim or defense, for a compensation depending upon the success of his efforts, is dangerous in its tendency, as furnishing an inducement for perjury and the subornation of witnesses. But in this case Hill was not a stranger in interest to the subject of the litigation. His antecedent relation to the mortgage made it just that he should be indemnified for the money advanced by him in case his payment should be available to Brown on the foreclosure action. The mere fact that the agreement might furnish temptation to Hill to prevaricate or furnish false testimony does not, we think, stamp the agreement as illegal *per se*, and no illegal or improper intent on the part of any of the parties is disclosed by the evidence."

A Colorado case seems to concede dependency on success being achieved before compensation

is earned, but attempts a distinction in the manner set forth. This case seems quite squarely opposed to the principal case.

In Wood v. Casserleigh, 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138, the contract recited that plaintiff was in possession of certain evidence necessary for defendant to establish his right to a certain mining claim and plaintiff agreed to furnish it for a specified interest in the recovery in suit therefor, plaintiff to employ counsel to prosecute the action, and there was a recovery. This contract was held not necessarily void, the court saying: "The contract in question does not show upon its face that plaintiff was to procure testimony of any certain character or furnish sufficient to establish the principal question of fact which was deemed material; but, on the contrary, simply required him to furnish evidence which was then in his possession, and which he had secured prior to the execution of the contract. * * * It cannot be said, therefore, that the agreement of the plaintiff to furnish the testimony referred to in the contract, or any act upon his part in securing it, would involve the commission by him or by any other person, of any act having the slightest taint of immorality, or which would be obnoxious to the pure administration of justice or injurious to public interests."

A later case by this court, Lincoln Mt. G. M. Co. v. Williams, 37 Colo. 193, 85 Pac. 844, shows a contract for plaintiff to examine mining properties and prepare himself to give expert testimony as to their value in a suit that had been begun. The contract was upheld as there was no suggestion that plaintiff was "employed to pervert the truth or to in any manner obstruct the course of justice."

The next case shows distinguishing from prior decision in that there was to be no sliding scale based on amount of recovery, such as is alluded to in an Illinois case hereinafter referred to.

Johnson v. Pietsch, 94 Ill. App. 459, showed that plaintiff was engaged to perform services of various kinds in a condemnation suit, such as an investigation of values of the part of the land taken and the effect of such taking upon what remained, consulting with counsel for defendant, examining plats, etc., as well as to testify in the case. He was not, however, called as a witness, although he attended the trial, lasting several days.

The court said: "We do not think such services were necessarily illegal or tending to corrupt practices. They are such as every property owner needs in order to secure a just appraisement of his land by a jury. A contract of that kind will be presumed to be legal until the contrary appears."

There was an intimation in the case that, if it had been shown, as was attempted, that there was to be a sliding scale in compensation according to recovery, this would have invalidated the contract.

The following cases are broadly condemnatory of all such contracts:

In Neece v. Joseph, Ark., 127 S. W. 797, plaintiff sued upon a contract whereby he was to be paid $500 to find and furnish proofs that defendant's wife (who was being sued for divorce) had given birth to a child, defendant claiming he was not the father of such a child and it not being known for certain that any such child had been born or where. The supreme court affirmed a judgment denying recovery, saying: "The vice of the contract does not consist in the fact that defendant employed the plaintiff to obtain evidence in his divorce suit; but the contract is, on its face, illegal because of the improper provision that the evidence to be procured should be of a given state of facts, of a tendency to enable defendant to win his suit. It will be observed that the contract did not provide for the payment of his services in procuring for use such testimony as actually existed, but it contemplated the procurement of evidence tending to establish a given state of facts, regardless of any other consideration."

This case refers for authority to the case of Quirk v. Muller, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647, and there we find the principle stated that: "A contract is void as against public policy, if by it one of the parties agrees to secure such testimony as will enable the others to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to promote unlawful acts."

The Quirk case cited for authority that of Gillet v. Board of Supervisors, 67 Ill. 256, in which case the contract sued on showed that plaintiff was engaged to procure evidence as to the casting of illegal votes at an election, authorizing a subscription by the county for certain railroad bonds, the plaintiff to be paid on a sliding scale, according to the number of votes proved to be illegal. The Illinois court says it was disproved that any corrupt means were used to obtain this evidence, "but the contracts themselves are pernicious in their nature. They created a powerful, pecuniary inducement on the part of the agents so employed, that the testimony should be given of certain facts, and that a particular result of the suit should be had. * * * Should contracts of this character receive countenance, we might, among the multiplying forms of agency of the time, have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court for pay, contingent upon success for their pay."

The principal case plants itself upon the proposition that an engagement by one, whose compensation depends upon success of litigation to produce "expert services" is upon its face a contract with a tendency to pervert the course of justice. It does not say "expert witnesses."

It is well known that expert testimony is generally expected to be after special preparation for testifying, and according to the Pennsylvania case above cited, any other is not strictly expert testimony. This contract, according to such a view, embraced preparation to testify, for which preparation a special contract might be made.

It does not appear that any particular condition was to be attached to the compensation experts were to receive, and unless a condition is to affect or may have a tendency to affect the testimony of a witness, where would be the tendency to pervert justice? The facts of the principal case seem hardly within the doctrine applied therein. C.

CORAM NON JUDICE.

ENGLISH REFORMED PROCEDURE.

The principal features of the English practice under the Judicature Act are stated by W. Blake Ogders, Q. C., as follows:

(I.) "Forms of action were abolished. * * * He is now allowed to state the facts on which he relies, and the court will grant him the remedy to which on those facts he is entitled.

(II.) "Each party must now state facts and not conclusions of law. He was bound, before 1875, to set out with reasonable precision the points which he intended to raise; but this he generally did by stating not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. His opponent thus learned that he desired to prove some set of facts which would sustain a given legal conclusion; but how he proposed to sustain that legal conclusion was not disclosed. For instance, there was a very common form of declaration: 'For money received by the defendant to the use of the plaintiff.' A claim in that form might be established by some six or seven entirely different sets of facts, and it could not be ascertained from the plaintiff's pleading, which set of facts would be set up at the trial, to show that the particular money claimed was received to the use of the plaintiff. Now the plaintiff must plead the facts on which he proposes to rely. * * *

(III.) "So, too, with the defense. 'The general issue' is abolished. In an action for goods sold and delivered, the defendant was formerly allowed to plead that he 'never was indebted as alleged.' This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of severally totally different defenses, e. g., that he never ordered the goods; that they never were delivered to him; that they were not of the quality ordered; that they were sold on a credit which had not expired at the time that the action was commenced; or that the Statute of Frauds had not been complied with. Now, a mere denial of the debt is inadmissible. So, in an action for money received to the use of the plaintiff, the defendant must either deny the receipt of the money, or the existence of those facts which are alleged to make such receipt a receipt to the use of the plaintiff.

"So in actions of tort, the defendant was formerly allowed to plead 'the general issue' 'Not guilty.' Under that plea it was open to him at the trial to raise several distinct defenses. Thus the defendant in an action of libel or slander by one short and convenient plea of 'Not guilty' simultaneously denied the publication of the words complained of, denied that he published them in the defamatory sense imputed by the innuendo, or in any defamatory or actionable sense which the words themselves imported asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. 'Not guilty' can no longer be pleaded in a civil action. The defendant must deal specifically with every allegation of which he does not admit the truth.

(IV.) "Demurrers were abolished. It is true that either party is still allowed to place on record an objection in point of law, which is very similar to the former demurrer. But there is this important difference. The party demurring could formally insist on having his demurrer separately argued, which causes delay. But now such points of law are argued at the trial of the action. It is only by consent of the parties or by order of the court or a judge that the party objecting can have the point set down for argument and disposed of before the trial. And, as a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary.

(V.) "Pleas in abatement were abolished. If either party desires to add or strike out a party, he must apply by summons. No cause or matter now 'shall be defeated by reason of the misjoinder or non-joinder of parties.'

(VI.) "Equitable relief is now granted, and equitable claims and defenses are now recognized in all actions in the high court of justice.

(VII.) "Payment into court was for the first time allowed generally in all actions.

(VIII.) "The right of set-off was reserved unchanged; but a very large power was given to a defendant to counterclaim. He can refuse and in some cases even against the plaintiff with others, subject only to the power of a master or judge, to order the claim and cross-claim to be tried separately if they cannot conveniently be tried together.

(IX.) "The names of the principal pleadings were changed. A statement of claim takes the place of the former declaration. Instead of pleas, the defendant now delivers a defense, or it may be a defense and counterclaim. The replication is now called a reply. The further pleadings, which now are rarely seen, retain their ancient names: Rejoinder, surrejoinder, rebutter and surrebutter."

CORRESPONDENCE.

CONSTITUTIONALITY OF THE INITIATIVE, REFERENDUM AND RECALL.

Editor Central Law Journal:

Your comment on the decision of the Texas court in Bonner v. Belsterling, 137 S. W., 1154, in 73 Central Law Journal, p. 93, appears to be the first treatise of the question presented in which a distinction between the initiative and referendum, on the one hand, and the recall, on the other, is made with reference to the federal constitution.

You seem also to have been the first among numerous writers on the subject to discover that "the guarantee" (of a republican form of government) was not "contemplated to raise any discussion of a philological character." Your further intimation in the same article, that an index to the character of the "guarantee" may be found in the language of the constitution itself, is but a reiteration of an elementary rule of construction which has always been accorded great force, and applies a test which the numerous advocates of the initiative and referendum seem studiously to have overlooked or avoided.

The first paragraph of Section 2 of Article I. of the Federal Constitution, provides for the election of members of the House of Representatives "by the people of the several states,

and the electors in each state shall have the qualifications requisite for electors of the **most numerous branch** of the **state legislature.**" (Black letters are ours).

The reference here is to a state legislature of more than one branch. The term "legislature" is defined by Webster as "the body of persons in a state, or politically organized body of persons invested with power to make, alter or repeal laws; a legislative body." "Legislative" is defined by the same authority as "making or having the power to make a law or laws."

The fourth paragraph of the same section provides that "When vacancies happen in the representation from any state, the **executive authority** thereof shall issue writs of election to fill such vacancies." Provision is also made in paragraph 2 of section 3 for filling vacancies in the senate by executive appointment.

Section 4 of Article IV, which contains the "guarantee," makes express reference to the legislatures of the states, and would seem to indicate the executive power lodged in a single individual, in this language: "and on application of the legislature or of **the executive** (when the legislature **can not be convened**) against domestic violence." The second paragraph of Article VI, after declaring the Constitution to be the supreme law of the land, continues: "and the **judges** in every state shall be bound thereby." * * *. The next paragraph declares that "The senators and representatives before mentioned, and the **members** of the state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution," etc.

"Behold a republic and a confederation of republics, the Constitution was saying, and such it is the purpose of the Constitution to preserve unimpaired." A simple reading of the Constitution is convincing that the republican form of government guaranteed to the states was but a subordinate counterpart of the greater government intended to preserve the various state units into a whole for the purposes declared in the preamble. The language used excludes the idea of the initiative and referendum.

Imagine the whole body of the electorate of any state divided into branches for legislative purposes; imagine the entire voting population of a state assembled (convened) to call upon the federal power for aid in suppressing domestic violence, and imagine also the task of administering the oath to support the federal constitution to such an assemblage.

Representatives in Congress are to be elected by electors having the requisite qualifications of electors of members of the most numerous branch of the state legislature. If each qualified elector is himself a member of the legislature, as he must be under the initiative and referendum, the electorate becomes useless, has no function, and representation in Congress fails for want thereof.

A question also arises as to whether an enactment by the initiative and referendum without the interposition of an elected legislative body is valid unless each elector has taken the oath required by the federal constitution.

Further observations might be made along this line, as well as the references in the Constitution to the executive and judicial departments of state government, but the foregoing is sufficient to justify the conclusion so well expressed in your comment "that the phrase 'republican form of government' was intended to have definite application"; that we need search no further than the Constitution itself for a clear definition of what the framers of the Constitution had in mind and expressed by that phrase—always the rule of first importance in the construction of any legal document.

J. D. GUSTIN.

Salem, Mo.

BOOK REVIEWS.

CRIME—ITS CAUSES AND REMEDIES. VOL. III. OF THE MODERN CRIMINAL SCIENCE SERIES.

We called attention to the first two volumes of the above named series in 72 Cent. L. J., 141.

The third volome under the above title is by Dr. Cesare Lombroso, the celebrated criminologist, as translated into English by Prof. Henry P. Horton, shows further progress by the capable committee in its selection of important treatises on criminology. It is impossible to give anything like a satisfactory review of a volume on so comprehensive a subject by one of the leading criminologists of the world in the space allowed here. The causes of and the remedies for crime are treated from so many viewpoints that merely to mention the chapter headings would be tedious and convey nothing very definite to the mind.

The subject of criminology, however, is being presented exhaustively through the series, and environment, heredity, avocation, religion, affluence, pauperism, climate, race have come in for analysis in statistics, so that amelioration and appreciable prevention may be approached on practical lines.

The seven volumes the committee are to send forth to the English-speaking world ought to help greatly towards a wider and more accurate laying of the foundation for more useful legislation for crime's repression.

This volume is in cloth binding and attractive in appearance, and is published by Little, Brown & Company, Boston, 1911.

HUMOR OF THE LAW.

A Canadian lawyer tells this story:

A bailiff went out to levy on the contents of a house.

The inventory began in the attic and ended in the cellar. When the dining-room was reached the tally of furniture ran thus:

"One dining room table, oak.

"One set chairs (6), oak.

"One sideboard, oak.

"Two bottles of whiskey, full."

Then the word "full" was stricken out and replaced by "empty," and the inventory went on in a hand that straggled and lurched diagonally across the page, until it closed with:

"One revolving doormat."—Everybody's.

The railroads of the world, it is estimated, annually kill less than one-fourth as many people as the mosquitoes. As there is no way of suing the mosquitoes, there is a great deal of profitable business lost to the lawyers.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Attachment**—Counsel Fees.—Defendant in attachment can recover counsel fees in a suit on the attachment bond.—Balinsky v. Gross, 128 N. Y. Supp. 1062.

2. **Attorney and Client**—Corporation.—A corporation cannot practice law either directly or indirectly by the employment of lawyers to practice for it.—In re Certain Lands for Bridge Purposes in the City of New York, 128 N. Y. Supp, 999.

3.——Responsibility of Client.—Where an attorney conducts a suit in such a way as to be liable himself in an action for trespass, the client is also liable.—Main Electric Co. v. Cohen, 129 N. Y. Supp. 66.

4.——Retainer.—An attorney's acceptance of a retainer from a client to investigate his rights is not improper, though the attorney know him to be a lunatic, or later discovers that fact.—People v. Adams, Ill., 94 N. E. 950.

5. **Banks and Banking**—Double Liability.—Double liability of stockholders of a bank constitutes a trust fund, which may be collected and administered by suit in equity in the nature of a creditors' bill for all creditors.—Conway v. Owensboro Savings Bank & Trust Co., C. C., 185 Fed. 950.

6.——Identifying Payee.—A bank, paying a check, is required to satisfactorily identify the payee.—Zaloom v. Ganim, 129 N. Y. Supp. 85.

7. **Bankruptcy**—Acceptance of Dividends.—The filing of a claim against a bankrupt's estate and the acceptance of dividends constitute a waiver of security.—In re Fisk & Robinson, D. C., 185 Fed. 974.

8.——Administration.—In bankruptcy proceedings under the Act of 1867 the judge acts as judge and not as court in carrying out the administrative features of the law.—Chilton v. Metcalf, Mo., 136 S. W. 701.

9.——Existing Liens.—A trustee in bankruptcy takes with notice of an existing lien on the bankrupt's property.—State v. Superior Court of King County, Wash., 115 Pac. 307.

10.——Chattel Mortgage.—Where a chattel mortgage covering after-acquired property was invalid as to it under the local law except as between the parties, the mortgagor's trustee in bankruptcy did not become a "party" within the rule, and, the mortgagee not having taken possession before bankruptcy, the trustee took free from the mortgage, the property being subject to seizure under Bankr. Act, sec. 70a.—In re Hurley, D. C., 185 Fed. 851.

11.——Contempt.——A member of a bankrupt firm, having wasted the firm's assets, concealed the same, and failed to appear and make a satisfactory disclosure with reference to his transactons, held punishable as for contempt.—In re Smith, D. C., 185 Fed. 983.

12.——Fraudulent Transfer.—A conveyance executed by a bankrupt without consideration, which if sustained would operate to defraud creditors, held an act of bankruptcy.—In re Leland, D. C., 185 Fed. 830.

13.——Fraudulent Transfers.—Transfers of property by a bankrupt to his wife, not with intent to defraud creditors, but made in recognition of a trust for advancements by her when the bankrupt was not insolvent, held valid.—Butcher v. Cantor, D. C., 185 Fed. 945.

14.——General Assignment.—As constituting an act of bankruptcy under Bankr. Act, sec. 3a (4), a general assignment for creditors may be made without a formal deed.—In re Federal Lumber Co., D. C., 185 Fed. 926.

15.——Jurisdiction.—Where bankruptcy funds are deposited in a designated depository, a simple debt is created, and the bankruptcy court no longer has the same jurisdiction as in case of property in the hands of a trustee or receiver.—In re Bologh, D. C., 185 Fed. 825.

16.——Liens.—A discharge in bankruptcy does not divest any lawful liens of the creditor existing at the time of the beginning of the bankruptcy proceedings.—McDonald v. H. E. Taylor & Co., 128 N. Y. Supp. 1048.

17.——Limitation of Actions.—Rev. St. U. S., sec. 5057, imposing a two-year statute of limitation on cause of action for or against an assignee in bankruptcy, does not apply to causes of action between persons who purchase property from the assignee and others, arising long after the purchase and after the assignee has become functus officio.—Brewer v. Yazoo & M. V. R. Co., La., 54 So. 987.

18.——Partnership.—Under bankruptcy Act July 1, 1898, where a firm was operating a private bank, and one of the partners committed an act of bankruptcy, and the total assets of the partners and the firm were insufficient to

pay the partnership debts, an adjudication was properly rendered against both the firm and the individual partners.—Yungbluth v. Slipper, C. C. A., 185 Fed. 773.

19.——Power of Referee.—A referee in bankruptcy held empowered to order that property unsuccessfully claimed by respondents be turned over to the trustees.—In re Belfast Mesh Underwear Co., D. C., 185 Fed. 834.

20.——Preference.—A security given for a present loan is not a preference, though the borrower is insolvent.—In re Sayed, D. C., 185 Fed. 962.

21.——Preference.—Bankruptcy Act, sec. 3a (3), providing that preferences obtained through legal proceedings shall constitute an act of bankruptcy, unless dissolved five days before sale, held to include liens obtained by legal proceedings valid under state laws.—In re Crafts-Riordon Shoe Co., D. C., 185 Fed. 931.

22.——Rescission.—A claimant, who paid money to bankrupts as brokers for stocks to be purchased by them, cannot rescind and reclaim the purchase money from the trustee in bankruptcy as a trust fund, without showing that the stock was not in fact purchased; and it is not sufficient to show that it was not delivered and did not come into the hands of the trustee.—In re Brown, C. C. A., 185 Fed. 766.

23.——Title in Trustee.—Bankrupt's trustee on being appointed and qualified takes possession of the bankrupt's property as of the date of adjudication under Bankr. Act, sec. 70a, in the same plight and condition the bankrupt then held it.—In re Hurley, D. C., 185 Fed. 851.

24. **Bills and Notes**—Consideration.—The abandonment of possession and claim to lands, subject to forfeiture to the state, is sufficient consideration for notes given to induce such abandonment.—Bledsoe v. Sumner, Tex., 136 S. W. 838.

25.——Attorney Fees.—In an action on notes providing for 10 per cent. attorney's fees for collection, plaintiff could show that he agreed to give his attorney such fees for his services.—Daniel v. Brewton, Tex., 136 S. W. 815.

26.——Parol Evidence.——The relations and liabilities of parties to accommodation paper can be shown by parol evidence.—Lamberson v. Love, Mich., 130 N. W. 1126.

27.——Holder in Due Course.—One taking a note after maturity is not a holder in due course.—Equitable Trust Co. of New York v. Lyons, 129 N. Y. Supp. 79.

28. **Cancellation of Instruments**—Equity. — Rescission of an instrument in equity held to lie in the sound discretion of the court which may impose terms therefor.—Springfield & N. E. Traction Co. v. Warrick, Ill., 94 N. E. 933.

29. **Carriers**—Ejection from Train.—A passenger held not required, to avoid ejection from a train, to go among his friends on the train to endeavor to borrow money to pay his fare erroneously demanded.—Light v. Detroit & M. Ry. Co., Mich., 130 N. W. 1124.

30.——Estoppel.—The act of an agent of a railroad company in contracting to carry goods at an illegal rate will not estop the carrier from repudiating the contract.—Baltimore & O. S. W. Ry. Co. v. New Albany Box & Basket Co., Ind., 94 N. E. 906.

31.——Presumption of Negligence.—No presumption of negligence arises because of a thin layer of ice on the steps of a car.—Sutton v. Pennsylvania R. Co., Pa., 79 Atl. 719.

32.——Round Trip Ticket.—An initial carrier issuing a round-trip coupon passenger ticket held to make the agent of the terminal carrier the agent to prepare the ticket for the return trip.—Galveston, H. & S. A. Ry. Co. v. Wiseman, Tex., 136 S. W. 793.

33. **Champerty and Maintenance.**—Agreement for Alimony.—A wife's agreement in a suit for divorce and alimony to pay her attorney a certain per cent. of the sum received as alimony is void as against public policy.—McConnell v. McConnell, Ark., 136 S. W. 931.

34. **Chattel Mortgages**—Nature of Property.—The right of mortgagor and mortgagee to agree whether the mortgaged property shall be considered real or personal held not to affect the actual nature of the property so as to interfere with the rights of creditors and others.—In re Munson, 128 N. Y. Supp. 1106.

35. **Common Lands**—Right of the State.—The legislature has constitutional power to pass a law authorizing the segregation and sale of community property.—Land Com'rs of Commons of Kaskaskia v. President and Trustees of Commons of Kaskaskia, Ill., 94 N. E. 970.

36. **Compromise and Settlement**—Acceptance on Condition.—One may not attach a condition to his acceptance of money paid in full.—Atterbury v. Binford, Mo., 136 S. W. 717.

37.——Burden of Proof.—One seeking to set aside an amicable settlement held required to establish his case by a clear and satisfactory preponderance of the evidence.—Stock v. Christie, Iowa, 130 N. W. 1074.

38. **Constitutional Law**—Impairment of Contracts.—An unconstitutional will is not a contract within the constitutional inhibition against the impairment of contractual obligations.—Brearley School v. Ward, N. Y., 94 N. E. 1001.

39. **Contracts**—Dealing in Futures.—Gambling contracts, such as contracts dealing in futures, are contrary to public policy and unenfofceable.—Burney v. Blanks, Tex., 136 S. W. 806.

40. **Copyrights**—Infringing on Index.—Whether an author of a book may use the form and wording of a prior index depends upon circumstances and the contents of the two books.—White v. Bender, C. C., 185 Fed. 921.

41.——Wrongful Use of Syllabi.—Where a subsequent law digester has made an unfair use of any part of the syllabi of his predecessor, it may be presumed that he made use of more than appeared on the face of his work.—Frank Shepard Co. v. Zachary P. Taylor Pub. Co., C. C., 185 Fed. 941.

42. **Corporations**—Check for Private Debt.—One receiving in payment of the individual debt of the president of a corporation a check signed in the name of the corporation, per such president, held put on notice of misappropriation.—St. Louis Charcoal Co. v. Lewis, Mo., 136 S. W. 716.

43.——Management.—The courts will not interfere with the adoption of by-laws for the government of a corporation in the management of its business on a mere showing that a wiser course might have been pursued.—Mc-

Callister v. Shannondale Co-operative Telephone Co., Ind., 94 N .E. 910.

44.——Reincorporation.—A corporation incorporated in one state may be made a corporation of another state by legislative enactment.—In re Lyon's Estate, 128 N. Y. Supp. 1004.

45. **Courts**—Situs of Debt.—A debt upon a specialty has its situs where the specialty, such as a bond, is.—Williams v. Fischlein, 129 N. Y. Supp. 129.

46. **Covenants**—Quiet Enjoyment.—A covenant of quiet enjoyment runs with land.—Gibbons v. Moore, Ark., 136 S. W. 937.

47. **Customs and Usages**—Pleading.—In negligence cases, where evidence of custom is admissible, it is not necessary to plead such custom.—Elmer v. Mutual S. S. Co., Minn., 130 N. W. 1104.

48. **Criminal Law**—Conditional Promise of Immunity.—An agreement with the district attorney, by one indicted with another for murder, to testify for the state until the case against the other is finally determined, when the case against the one testifying is to be dismissed, is valid.—Ex parte Carter, Tex., 136 S. W. 778.

49.——Forgery.—On a trial for uttering a forged note parol testimony of the contents of the note held admissible.—Slatter v. State, Tex., 136 S. W. 770.

50.——Motive.—Motive is a material element as tending to show the state of mind of accused.—State v. McHamilton, La., 54 So. 971.

51.——Offense Against State and City.—The same act may constitute an offense against the state and a city ordinance, and a person may be proceeded against under either or both.—Ex parte Simmons, Okla., 115 Pac. 380.

52. **Death**—Action for.—The father of a child cannot recover for its wrongful death, unless the child itself would have had a cause of action against defendant for the injury had it survived.—Butler v. Chicago, R. I. & P. Ry. Co., Mo., 136 S. W. 729.

53.——Measure of Damages.—Loss of society, comfort, and care to a wife and children, as well as their support, may be considered on the question of pecuniary loss to them by the death of the husband and father.—Simoneau v. Pacific Electric Ry. Co., Cal., 115 Pac. 320.

54. **Deeds**—Cancellation.—Upon setting aside a deed executed to defendant by his father, for undue influence, held, that defendant would not be allowed for improvements.—Bozarth v. Banister, Ky., 136 S. W. 902.

55.——Condition Subsequent.—It being presumed that a condition subsequent in a deed will be performed, the grantee takes every interest and estate in the land.—Fowler v. Coates, N. Y., 94 N. E. 997.

56.——Presumption of Acceptance.—Where a deed was executed by a father to his minor child, and recorded, there was a presumption of acceptance and sufficient delivery.—Decker v. Stansberry, Ill., 94 N. E. 940.

57.——Presumption of Delivery.—Presumption of delivery of a deed arises from its possession by the grantee, and can be overcome only by clear proof.—Schroeder v. Smith, Ill., 94 N. E. 969.

58.——Subsequent Title in Grantor.—Title acquired by one after making a warranty deed without title held to inure to the benefit of the grantee, though taken in the name of another.—Collins v. Buffalo, L. & R. Ry. Co., 129 N. Y. Supp. 139.

59. **Dismissal and Nonsuit**—Maker and Indorser.—One suing on notes could dismiss as to the maker and hold an indorser upon proof of the maker's insolvency.—Daniel v. Brewton, Tex., 136 S. W. 815.

60. **Divorce**—Abandonment.—The refusal of one spouse to become reconciled with the other and live together held to amount to willful abandonment.—McConnell v. McConnell, Ark., 136 S. W. 931.

61.——Alimony.—The fact of marriage between the parties must appear before an order is made for the taking of testimony as to alimony and counsel fees.—Arendall v. Arendall, Fla., 54 So. 957.

62. **Ejectment**—Writ of Dispossession.— A marshal, charged with execution of a judgment in ejectment, has no right of appeal to the court for instructions because of protests or notices served on him by persons not parties.—Dickinson v. Huntington, C. C. A., 185 Fed. 703.

63. **Eminent Domain**—Prospective Damages.—Prospective damages from the frightening of stock held not recoverable in a proceeding to condemn a railway right of way.—Louisville & N. R. Co. v. Hall, Ky., 136 S. W. 905.

64. **Equity**—Laches.—Laches can be invoked only to aid an existing equitable right.—Stanton v. Thompson, Mo., 136 S. W. 698.

65. **Escheat**—Burden of Proof.—The state, in suing to declare lands escheated, must recover, if at all, on the strength of its own title, and not on the weakness of defendant's.—State v. Williams, Miss., 54 So. 951.

66. **Estoppel**—Knowledge.—There cannot be a waiver of a thing without knowledge of the existence of that which is the subject of waiver.—Rogers v. Home Ins. Co. of New York, Mo., 136 S. W. 743.

67. **Evidence**—Competency.—Members of the board of equalization cannot, on a tax appeal, be inquired of as to the operation of their minds in valuing and taxing the property.—Boston & M. R. R. v. State, N. H., 79 Atl. 701.

68. **Execution**—Money in Bank.—Money in a bank, though liable to garnishment, is not subject to execution.—Wash v. Hendrick, Ky., 136 S. W. 883.

69. **Executors and Administrators**—Decedent's Land.—An executor takes no title or interest in decedent's realty unless expressly or by implication given to him by the will.—Emmerson v. Merritt, Ill., 94 N. E. 955.

70.——Settlement.—If a claim is probated, and afterwards found not legal, the executors should be allowed credit for its payment.—Judson v. Bennett, Mo., 136 S. W. 681.

71.——Widow's Allowance.—The rents from realty willed to testator's children are not subject to the widow's allowance.—Lamar v. Belcher, Mo., 136 S. W. 748.

72. **False Pretenses**—Executory Contract.—The inducement of the execution of a parol executory contract is not an offense under the statute relating to obtaining money by false pretenses.—Josma v. Western Steel Car & Foundry Co., Ill., 94 N. E. 945.

73. **Foreign Corporation**—Business in Another State.—The doing of business in Arkansas by a foreign corporation without compliance with the laws did not dissolve such corporation and render it a partnership, as to business done within the state.—National Bank of Wichita v. Spot Cash Coal Co., Ark., 136 S. W. 953.

74. **Fraud**—False Representations.—It is immaterial as to liability that a person making representations has no actual knowledge as to their accuracy, provided they are relied on by the person to whom they are made.—Freeman v. F. P. Harbaugh Co., Minn., 130 N. W. 1110.

75.——Intent.—A promise to perform an act, though accompanied at the time with an intention not to perform it, is not such a representation as can be made the ground of an action for deceit.—Grubb v. Milan, Ill., 94 N. E. 927.

76.——Intent.—Ordinarily the same evidence that proves making of representations known to be false is sufficient also to establish intent to deceive.—Smith v. Packard & Co., Iowa, 130 N. W. 1076.

77. **Guaranty**—Notice to Guarantor.—An absolute guaranty, in consideration of the appointment of one as salesman, of his performance of his duties under his contract of appointment, held operative, without notice to the guarantors of its acceptance, though signed before the signing by either of the other parties of the contract of appointment.—J. R. Watkins Medical Co. v. Brand, Ky., 136 S. W. 867.

78. **Husband and Wife**—Estoppel.—A recital in a deed to a wife that the land was purchased with her paraphernal funds estopped the husband and his heirs to deny the wife's title.—Succession of Hostetter, La., 54 So. 961.

79.——Personal Earnings.—The housekeeping services of a married woman living with her husband belong to the husband.—Snickles v. City of St. Joseph, Mo., 136 S. W. 752.

80.——Tenancy by Entirety.—A tenancy by the entirety, while partaking of some of the qualities of a joint tenancy, is a different estate, both in form and substance.—Vollaro v. Vollaro, 129 N. Y. Supp. 43.

81. **Infants**—Capacity to Commit Crime.—An infant under 7 years of age is conclusively presumed incapable of a criminal intent. Between the ages of 7 and 14 the presumption is only prima facie.—Miles v. State, Miss., 54 So. 946.

82. **Injunction**—Stock Running at Large.—A court of equity had no jurisdiction to restrain defendant from permitting stock to run at large within the limits of a city in violation of city ordinances.—City of De Queen v. Fenton, Ark., 136 S. W. 945.

83. **Insurance**—Equity.—Equity has jurisdiction to set aside, on the ground of fraud, an award under a fire policy.—Dixie Fire Ins. Co. v. American Confectionery Co., Tenn., 136 S. W. 915.

84.——Future By-Laws.—Policy-holders in an insurance association, agreeing to be bound by future by-laws passed, held to intend only such by-laws as the association has power to pass.—Eaton v. International Travelers' Ass'n, Tex., 136 S. W. 817.

85.——Ineligible Beneficiary.—Where one of the beneficiaries named in a benefit certificate is not eligible, and no provision is made for apportionment, the eligible beneficiary takes the entire fund.—Cunat v. Supreme Tribe of Ben Hur, Ill., 94 N. E. 925.

86.——Waiver.—A provision in an insurance policy avoiding it for additional insurance, taken without insurer's consent and indorsement on the policy, may be waived by insurer or its agent.—Rogers v. Home Ins. Co. of New York, Mo., 136 S. W. 743.

87. **Landlord and Tenant**—Covenant to Repair.—In an action by a landlord for rent, breach of the landlord's covenant to repair held no defense.—Lutz v. Goldfine, 129 N. Y. Supp. 63.

88.——Waiver.—Where a tenant waived a provision of a lease for the erection by the landlord of a building, he could not thereafter rescind the contract by reason of the default. Porto v. O'Reilly, 129 N. Y. Supp. 69.

89. **Libel and Slander**—Privilege.—Allegations in a petition to have appointment of a receiver recalled which were pertinent to the pleading are not libelous, where there was probable cause for making them.—Lebovitch v. Joseph Levy & Bros. Co., La., 54 So. 978.

90. **Limitation of Actions**—Exceptions.—Limitations of actions are entirely statutory, and a statute creating a limitation may provide an exception thereto.—Knight's Adm'r v. Illinois Const. R. Co., Ky., 136 S. W. 874.

91.——Revival.—A promise to pay a debt when conditional, is not sufficient, standing alone to take the debt out of the statute of limitations.—Thyng v. Hussey, N. H., 79 Atl. 690.

92. **Master and Servant**—Assumption of Risk.—Where an employee was fully informed as to the dangers of using a certain appliance in his work, the employer was not negligent in permitting him to use it.—Kindellan v. Mount Washington Ry. Co., N. H., 79 Atl. 691.

93.——Assumption of Risk.—A risk of an employment is transformed to an extraordinary risk when the master's negligence contributes an added hazard.—Baer v. Baird Mach. Co., Conn., 79 Atl. 673.

94.——Non-Delegable Duty.—A master cannot relieve himself of the duty to furnish a safe place by contract, express or implied.—Jarrell v. Blackbird Block Coal Co., Mo., 136 S. W. 754.

95.——Responsibility of Servant.—An employee, committing a tort, whereby a third person is injured, cannot escape liability, on the ground that it was committed under the directions of the employer.—Englert v. New Orleans Ry. & Light Co., La., 54 So. 963.

96.——Safe Place.—The obligation of a municipal corporation to use care to furnish its servants a safe place in which, and safe tools and appliances with which, to work, is not different from that of the private employer.—Condon v. City of Chicago, Ill., 94 N. E. 976.

97.——Safe Place to Work.—The rule that the master is not liable for injuries to a servant while engaged in making a dangerous place safe held not to apply where a coal digger is preparing an entry in a mine for props, at the time and in the manner directed by the vice principal.—Reid Coal Co. v. Nichols, Tex., 136 S. W. 847.

98. **Mechanics' Liens**—Lienable Articles.—To support a materialman's lien, it must appear

that the material was sold by the materialman for use in the particular building on which a lien is sought.—Topp v. Standard Metal Co., Ind., 94 N. E. 891.

99. **Navigable Waters**—Maritime Tort.—To place or negligently leave a wire cable attached to the anchor chain of a buoy in a harbor, under water, where it is liable to cause injury to vessels using the harbor, is negligence and constitutes a maritime tort which subjects the wrongdoer to legal liability for the direct consequences of an injury resulting therefrom. —North American Dredging Co. v. Pacific Mail S. S. Co., C. C. A., 185 Fed. 698.

100. **Partition**—Coparceners.—At common law a writ of compulsory partition only ran in favor of one coparcener against another.—Vollaro v. Vollaro, 129 N. Y. Supp. 43.

101. **Pledge**—Sale of Pledge.—Where a pledgee sells stock upon notice, he is disqualified from buying the stock.—Rosenblatt v. Weinman, Pa., 79 Atl. 710.

102. **Principal and Agent**—Personal Discretion.—A confidential agent, or one who is required to exercise discretion, may not intrust the performance of his duties to another.—Winkleblack v. National Exchange Bank of Springfield, Mo., 136 S. W. 712.

103. **Principal and Surety** — Discharge of Surety.—Extension of time of payment discharges sureties, and in case of installments discharges them pro tanto.—Cohn v. Spitzer, 129 N. Y. Supp. 104.

104.——Fraud.—Deception of a surety by the principal is not imputable to the obligee unless he participated in or knew of the fraud.—Dunfee v. Dunfee, 129 N. Y. Supp. 142.

105. **Process**—Publication Service.—Service of process by newspaper publication is strictissimi juris.—Stanton v. Thompson, Mo., 136 S. W. 698.

106. **Quieting Title**—Jurisdiction.—A state held authorized by statute to provide that title to real estate may be settled by suit in which a non-resident is brought into court by publication.—Long v. Lackawanna Coal & Iron Co., Mo., 136 S. W. 673.

107. **Railroads**—Crossing.—In an action for injuries at a crossing, though danger was created by the traveler's negligence, if trainmen could have prevented the injury, their lack of care was the proximate cause of injury.—Cavanaugh v. Boston & M. R. R., N. H., 79 Atl. 964.

108.——Orders of Commission.—An order of the Railroad Commission requiring the construction of a spur track is presumed to be reasonable until the contrary appears.—St. Louis, I. M. & S. Ry. Co. v. State, Ark., 136 S. W. 938.

109.——Safe Track for Pedestrians.—A railroad is not bound to keep its track safe for pedestrians by the use of only sound ties.—Davis v. Quincy, O. & K. C. R. Co., Mo., 136 S. W. 718.

110. **Reformation of Instruments**—Laches.—Laches is not imputable to one in peaceable possession of land for delay in suing to correct a mistake in the description of the land in the conveyance to him.—Schroeder v. Smith, Ill., 94 N. E. 969.

111. **Removal of Causes**—Presumption of Objection.—The presumption is that plaintiff objected to removal of a cause to the United States Circuit Court where the record fails to show his consent.—St. Louis & S. F. R. Co. v. Kiser, Tex., 136 S. W. 852.

112. **Sales**—Construction of Agreement.—In construing agreements for the sale of personal property, the intention of the parties controls, to be ascertained from the contract and surrounding circumstances, as modified by business usages.—Beatty v. Miller, Ind., 94 N. E. 897.

113.——Contract for Cash.—A contract for sale of corn held to imply payment therefor in cash, so that the buyer could not recover for failure to deliver where he refused to pay except by check when banks were not cashing checks.—Thompson v. Seek, Kan., 115 Pac. 397.

114.——Offer to Return.—The buyer of an automobile who seeks to rescind the sale cannot excuse his failure to offer to return it by showing that the machine had no market value.—Flint v. Newton, Tex., 136 S. W. 820.

115.——Rights of Seller.—On breach by a purchaser of a contract of sale, the seller may store the goods and sue for the price.—Daly v. Lowenstein, 129 N. Y. Supp. 25.

116. **Specific Performance**—Mutuality.—As a rule, a contract will not be specifically enforced, unless it can be done mutually.—Northern Texas Realty & Construction Co. v. Lary, Tex., 136 S. W. 843.

117. **Street Railroads**—Definition.—Whether or not a railway is a street railway does not depend upon the motive power. Other features are to be considered.—Simoneau v. Pacific Electric Ry. Co., Cal., 115 Pac. 320.

118. **Taxation**—Exemption.—Statutes exempting property from taxation are strictly construed, while statutes are liberally construed in favor of equal taxation.—Greenbush Cemetery Ass'n v. Van Natta, Ind., 94 N. E. 899.

119.——Exemption.—The right to have property exempted from taxation must be established by direct proof of all facts necessary to authorize exemption.—Monticello Seminary v. Board of Review of Madison County, Ill., 94 N. E. 938.

120. **Tenancy in Common**—Managing Common Property.—A tenant in common held not entitled to compensation for managing the common property, in the absence of understanding to that effect.—Lake v. Perry, Miss., 54 So. 945.

121. **Tender**—Sufficiency Of.—A creditor who objects to a check, offered by his debtor, solely on the ground that it does not contain the correct amount, waives the objection that the tender was not made in cash.—Beatty v. Miller, Ind., 94 N. E. 897.

122. **Trade-Marks and Trade-Names**—Definition.—The gist of a trade-mark is its association in the public mind with a product.—Pflugh v. Eagle White Lead Co., C. C. A., 185 Fed. 769.

123. **Wills**—Execution in Duplicate.—Where a will is executed in duplicate only one need be probated; but the other must be produced in court.—In re Schofield's Will, 129 N. Y. Supp. 190.

124.——Intent.—A testator is presumed to intend to dispose of his entire estate.—Northern Trust Co. v. Wheaton, Ill., 94 N. E. 980.

125.——Occasional Delusions.—Occasional delusions of a testator must in some way influence and enter into the will itself, and the will must be the actual offspring of the delusion, in order to affect its validity.—In re Hock's Will, 129 N. Y. Supp. 196.

126.——Residuary Clause.—A general residuary clause will not dispose of a lapsed interest in the residuary estate.—In re Hoffman's Will, N. Y., 94 N. E. 990.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Published by

Central Law Journal Company,

420 MARKET STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Entered at the Post Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF.
ALEXANDER H. ROBBINS, MANAGING EDITOR.

CONTENTS.